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CASE NO.80-1859

in the

Supreme Court

of the

United States

October Term, 1980

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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May 20, 1981

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STATEMENT OF THE CASE

Respondent, ETHYL CORPORATION,[1] (hereinafter referred to as ETHYL) sets forth the salient facts of this case because of certain inaccuracies and misleading statements in the Petition for Writ of Certiorari filed by DAVID BALTER (hereinafter referred to as BALTER). ETHYL will, however, confine itself to a statement of facts relevant to determination of this Court's jurisdiction, in accordance with the applicable Federal Statutes and the Rules of the United States Supreme Court.

ETHYL, one of several defendants in the trial court proceedings, appealed to the District Court of Appeal of Florida, Third District, from a Final Judgment for damages entered in favor of BALTER. The judgment was entered on a jury verdict which, in answer to a special interrogatory, found that ETHYL had maliciously interfered with BALTER's advantageous business relations. Upon the conclusion that the evidence established as a matter of law that ETHYL committed no such tort, the District Court of Appeals of Florida, Third District, reversed the judgment below and ordered that judgment be entered for ETHYL (A.2-15).[2]

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[1]The Elk Horn Coal Corporation, a West Virginia corporation, is a subsidiary of ETHYL CORPORATION and is named herein in compliance with Rule 28.1 of the Rules of the United States Supreme Court.

[2]References in the following format, viz: (A.) are to the Appendix filed by BALTER as a part of his Petition for Writ of Certiorari.

BALTER moved for rehearing alleging, *inter alia*, that the District Court's reversal deprived BALTER of his constitutional right to trial by jury (A.16-35). Rehearing was denied by the District Court (A.36) and BALTER petitioned the Supreme Court of the State of Florida to grant a Writ of Certiorari on the alleged basis that the decision of the District Court was in conflict with previous decisions of the Supreme Court of the State of Florida and other Florida District Courts of Appeal (A.37). The Brief filed by BALTER in support of his petition to the Supreme Court of Florida also alleged deprivation of BALTER's asserted constitutional right to a jury trial (A.55).

The Supreme Court of the State of Florida declined to accept jurisdiction and denied the Petition for Review (A.60). BALTER now petitions this Court for Writ of Certiorari, pursuant to 28 U.S.C. §1257(3), on the basis of two rights ostensibly set up or claimed under the Constitution of the United States. The first claim, which has never been raised by BALTER prior to the instant Petition, is that Florida's system of territorially distinct courts deprives BALTER of his constitutional right to equal protection. The second claim is that the decision of the Florida District Court of Appeal, Third District, which reversed a jury verdict, deprived BALTER of his constitutional right to a jury trial.

SUMMARY OF ARGUMENT

The first claim, concerning BALTER's right to equal protection, has not been raised previously and may not, therefore, be raised for the first time in this Court. Furthermore, equal protection of the laws is not violated by a system of territorially distinct appellate courts. It is the well-established right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter and amount, and the finality and effect of their decisions.

The second claim, concerning alleged deprivation of a right to a jury trial, does not raise a constitutional issue which would vest this Court with discretionary jurisdiction under 28 U.S.C. §1257 (3). The Seventh Amendment to the Constitution of the United States is not applicable to the states through the due process clause of the Fourteenth Amendment and this Court has ruled that, without contravening either of those amendments, trial by jury may be modified by a state or abolished altogether.

There is no constitutional issue raised by BALTER that justifies the grant of a Writ of Certiorari.

ARGUMENT

I.

BALTER'S CLAIM TO DENIAL OF EQUAL PROTECTION HAS NOT BEEN RAISED OR DECIDED PREVIOUSLY AND IT MAY NOT, THEREFORE, BE RAISED IN THIS COURT FOR THE FIRST TIME.

Rule 23.1 (f) of the Supreme Court Rules requires a Petitioner seeking review of a judgment from a state court to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari. The Record before this Court is devoid of any reference to equal protection or to the structure of the court-system of the State of Florida. In fact, the federal question, which BALTER now asserts, was neither raised nor decided in the state courts and this alone, is fatal to BALTER's claim. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Missouri Pac. R. Co. v. Hanna*, 266 U.S. 184 (1924).

This Court has stated the rule succinctly:

> It is well established that certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a state-court decision. *Wilson v. Aiken Industries, Inc.*, 439 U.S. 877 (1978).

Even though the fact pattern in *Aiken Industries, supra*, presented an egregious miscarriage of justice, this Court

declined to recede from the express requirements of Rule 23. The sound reasons underpinning these requirements were expressed in *Cardinale*:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And, in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. *Cardinale*, 394 U.S. at 439.

This Court should, therefore, deny this Petition, without reaching the merits of this issue, in light of BALTER's failure to accord to the State of Florida any opportunity to asses the constitutionality of its court system, a matter of considerable significance to, and great impact upon, the State of Florida.

This Honorable Court has consistently refused to decide federal constitutional issues raised for the first time in petitions for Writ of Certiorari to the state courts. This cause presents no exception and BALTER's Petition should, therefore, be denied.

In an abundance of caution, even though this Court should not reach the merits of the first claim asserted by BALTER, ETHYL will briefly address the equal protection issue.

Since this Court decided the lead case of *Missouri vs. Lewis*, 101 U.S. 22 (1880), this Court has consistently and repeatedly held that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature for all or any part of its territory. *North vs. Russell*, 427 U.S. 328 (1976); *McGowan vs. State of Maryland*, 366 U.S. 420 (1961); *Salsburg vs. State of Maryland*, 346 U.S. 545 (1954); *Griffin vs. County School Board of Prince Edward Co.*, 377 U.S. 232 (1964).

BALTER contends that the Florida Statutes establishing territorial subdivision in the Florida Appellate Court system have denied him his right of equal protection. This argument is not new and is uniformly rejected where the territorial distinctions serve some state interest and all people in the different jurisdictions are afforded equal treatment under the laws applicable in those jurisdictions. *Missouri vs. Lewis*, 101 U.S. 22 (1880). As this Court acknowledged in *Salsburg vs. State of Maryland*:

> [T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be denial to any person of the equal protection of the laws . . .
> It means that no persons or class of persons

> shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. 346 U.S. at 551.

More recently, the Court approved this analysis in *North vs. Russell*, again quoting the *Lewis* Court:

> Each State ... may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. 427 U.S. at 339.

The legal principles which govern the decisions to be made here have been well established by this Court, and the federal courts generally, for a period in excess of one hundred years. The State of Florida does not violate the Equal Protection Clause of the Fourteenth Amendment by establishing five Appellate Districts. The Equal Protection Clause relates to equality between persons as such, rather than between areas. Accordingly, on numerous occasions this Court has held that territorial uniformity is not a constitutional requisite. *Salsburg, supra*; *McGowan, supra*; *Lewis, supra.*

BALTER seeks to have this case reviewed on the basis of an issue which this Court has determined does not raise a constitutional question. As such, review is not available under 28 U.S.C. §1257 (3).

BALTER's reliance upon *Lindsey vs. Normet*, 405 U.S. 56 (1972), is misplaced. This Court held in *Lindsey* that when an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. The State of Florida has a uniform system of appeals and review available to all litigants.[3]

The first issue presented by BALTER fails to raise a constitutional question which would justify this Court's grant of a Writ of Certiorari to the Supreme Court of Florida. This Petition should, therefore, be denied.

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[3]See the provisions of the Constitution of the State of Florida, Article V, Sections 3(b) and 4(b), reproduced at Pages x through xii of the Petition filed by BALTER.

II.

THE FEDERAL CONSTITUTION DOES NOT GUARANTEE CIVIL LITIGANTS A JURY TRIAL IN STATE COURT.

Even though the record reflects that BALTER attempted to raise this issue in the state courts, nowhere does the Record show that the question was passed upon by either the Florida District Court of Appeal or the Supreme Court of Florida. This showing must be made by BALTER, before he is in compliance with Rule 23 of the United States Supreme Court Rules. This Court has held that the federal question must be raised *and* decided in the State Court and, if both of these do not appear on the record, the jurisdiction of this Court fails. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Assuming, *arguendo*, that this Court may overcome said failure of jurisdiction, BALTER's assertions are still to no avail. As BALTER acknowledges, this Court has consistently refused to rule that preservation of civil jury trial is an essential element of ordered liberty required of the states by the due process clause of the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319 (1937); *Hardware Dealers' Mutual Fire Ins. Co. vs. Glidden Co.*, 284 U.S. 151 (1931); *Fay v. People of State of New York*, 332 U.S. 261 (1947).

The Court has steadily ruled that:

> [T]he commandments of the Sixth and Seventh Amendments, which require jury trial in criminal

> and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.' (citation omitted) *Fay*, 332 U.S. at 288.

BALTER's reliance upon the Seventh Amendment to the United States Constitution is, therefore, misplaced.

Furthermore, this Court has not shown any inclination in more recent cases to place any additional constitutional restrictions upon the states, in connection with civil jury trials. *Alexander v. Virginia*, 413 U.S. 836 (1973). In *Alexander*, this Court held that trial by jury was not constitutionally required in state civil proceedings. This holding acknowledges and follows the well-considered decisions of a long list of distinguished jurists who have declined to command total incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.[4]

During the Federal Convention, trial by jury in civil cases was touched upon in debate but was intentionally left out of the final document, probably because of the great diversity in state civil practice.[5] Additionally, it

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[4]Mr. Justice Matthews in *Hurtado v. California*, 110 U.S. 516 (1884); Mr. Justice Cardozo, in *Palko v. Connecticut*, 302 U.S. 319 (1937); Mr. Justice Harlan, in *Duncan vs. Louisiana*, 391 U.S. 145 (1968); and many others.

[5]See *Henderson*, The background of the Seventh Amendment, 80 Harv. L. Rev. 289, 292-4 (1966). See also *The Federalist* No. 83, at 524 (Wright, 1st ed. 1961) (Hamilton).

is paradoxical and anachronisitic to assert that the civil jury of 1791 is necessary to assure fair trials in suits at common law in this country when civil juries have been all but done away with in England, the source of the common law.[6]

The question of the applicability of the Seventh Amendment provisions to the states through the Due Process Clause of the Fourteenth Amendment was squarely raised in *Walker vs. Sauvinet*, 92 U.S. 90 (1876). To a claim that the Seventh Amendment applied to the states, the Court responded with language which has been the governing law ever since:

> [A]rt. seven of the Amendments ... relates only to trials in the courts of the United States ... The States so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. 92 U.S. at 92.

For one hundred years, the Supreme Court has not deviated from *Walker u Sauvinet*. Indeed, the Supreme

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[6]Jackson The Machinery of Justice in England, P 64 (1960). See also, Devlin, Trials by Jury, 130-133 (1956).

Court has frequently denied certiorari in cases involving the precise issues raised in the instant case.[7]

As Mr. Justice Cardozo, speaking for the Court, declared;

> Few would be so narrow or so provincial as to maintain that a fair and enlightened system of justice would be impossible without [the right to trial by jury]. *Palko v. Connecticut*, 302 U.S. at 325.

In agreement with Mr. Justice Cardozo, Mr. Justice Harlan observed:

> Neither history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law. *Duncan v. Louisiana*, 391 U.S. at 175.

More recently, when this Court was presented with the question of a juvenile's right to jury trial, the Court held that due process did not require a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). This holding vividly illustrates the fact that the right to

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[7]See, *Parsons v. Gulf*, 389 U.S. 896 (1967; *Jones v. Aetna*, 389 U.S. 990 (1967); *Mayes v. McKeithern*, 396 U.S. 868 (1969); *Marshall v. Southern Farm Bureau Casualty Co.*, 393 U.S. 883 (1968); *King v. Vico*, 385 U.S. 841 (1966); *Broussard v. State Farm*, 386 U.S. 909 (1967); *Sule v. Mo. Pac. R.R. Co.*, 385 U.S. 819 (1966); *Barry v. Aetna*, 401 U.S. 1005 (1971).

jury trial is not so "fundamental to the American scheme of justice" as to be required at all times, in a certain form, or in all types of cases.

The Court has expressed the sound federal principal underlying the Court's refusal to apply the restrictions of the Seventh Amendment to the states;

> [I]t suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931).

As long as this Court declines to accept the total incorporation doctrine, there is no rational basis for asserting that due process requires a jury in common law cases in state courts, but that a jury may be dispensed with in equity, admiralty, and numerous types of cases based on statutory causes of action. In sum, there is no reason for this Court to accept BALTER's invitation to recede from established precedent which has served well the ends of justice in this nation for a period of time in excess of a century.

Furthermore, this cause was tried to a jury and the Florida District Court of Appeal reversed upon the conclusion that the evidence established as a matter of law that ETHYL did not commit the tort complained of. Even in the federal courts such a reversal would be

permitted.[9] The findings of a jury are not so sacrosanct that they must stand, however unfounded and erroneous.

The cases relied upon by BALTER are criminal cases, which are not appropriate authority for the radical change which BALTER now advocates. BALTER's emphasis on the historical environment of trial by jury and his reference to its English ancestry is also misdirected, in view of the fact that in England the civil jury has virtually vanished.[10]

It is apparent that BALTER has failed to set up or claim any right, privilege or immunity under the Constitution of the United States of which this Court may take cognizance. The Petition for Writ of Certiorari should therefore be denied.

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[9] Under the Federal Rules of Civil Procedure, the trial judge may grant an new trial, direct a verdict, enter summary judgment and judgment notwithstanding the verdict. All of these require factual review and the Circuit Courts of Appeal are permitted no less latitude. See, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

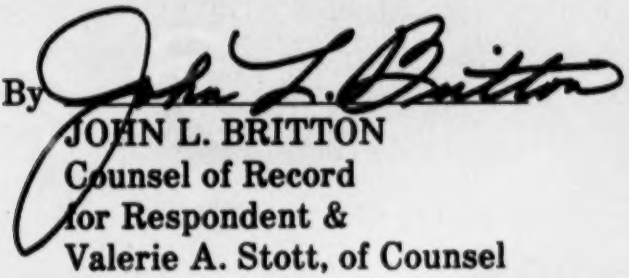
[10] See note 6, supra.

CONCLUSION

Neither of the issues presented by BALTER justifies this Court's exercise of jurisdiction under 28 U.S.C. §1257(3) or Rule 23 of the Rules of the United States Supreme Court. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

BRITTON, COHEN, KAUFMAN,
BENSON & SCHANTZ

By 
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